

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**February 4, 2005**

<b>IN RE:</b>	)	
	)	
<b>PETITION OF ON-SITE SYSTEMS, INC.</b>	)	<b>DOCKET NO.</b>
<b>TO AMEND ITS CERTIFICATE OF</b>	)	<b>03-00329</b>
<b>CONVENIENCE AND NECESSITY</b>	)	
	)	
<b>PETITION OF TENNESSEE WASTEWATER</b>	)	<b>DOCKET NO.</b>
<b>SYSTEMS, INC. TO EXPAND ITS SERVICE AREA TO</b>	)	<b>04-00045</b>
<b>INCLUDE AN AREA KNOWN AS SEVIER COUNTY</b>	)	

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**INITIAL ORDER APPROVING IN PART, AND DENYING IN PART, PETITION TO  
AMEND CERTIFICATE OF CONVENIENCE AND NECESSITY**

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This consolidated docket is before the Hearing Officer for consideration of petitions filed by On-Site Systems, Inc., now known as Tennessee Wastewater Systems, Inc., to amend its Certificate of Public Convenience and Necessity to expand its service territory to include Sevier County. Upon review of the record, including testimony and post-hearing briefs, the Hearing Officer approves in part and denies in part the request to amend. In the course of reaching this determination the Hearing Officer has addressed specific issues raised by the parties as fully stated herein.

**BACKGROUND**

On April 6, 1994, On-Site Systems, Inc. (now called Tennessee Wastewater Systems, Inc., hereinafter "Tennessee Wastewater" or "the Company")<sup>1</sup> received a Certificate of Public Convenience and Necessity ("CCN") in Docket No. 93-09040 from the Tennessee Public

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<sup>1</sup> See *In re Petition of On-Site Systems, Inc. to Change Its Name to Tennessee Wastewater Systems, Inc.*, Docket No. 03-00518, (Order Granting Approval of the Petition of On-Site Systems, Inc. for a Name Change) (February 19, 2004)

Service Commission to provide wastewater service to the Oakwood Subdivision in Maury County, Tennessee. Since that time, Tennessee Wastewater has been granted approval to expand its service territory to include other areas in Tennessee.

**Travel of Docket No. 03-00329**

On May 9, 2003, Tennessee Wastewater (On-Site Systems, Inc.) filed the *Petition of On-Site Systems, Inc to Amend its Certificate of Convenience and Necessity* (“*Petition*”) with the Tennessee Regulatory Authority (“Authority” or “TRA”). The *Petition* was assigned Docket No. 03-00329. With its *Petition*, the Company seeks to expand the service area authorized by its CCN to include the unincorporated areas of Sevier County except for the area currently served by the East Sevier County Utility District (“East Sevier” or the “Utility District”) and those areas within the city limits and planned growth areas of the municipalities of Sevierville, Pigeon Forge (“Pigeon Forge” or “the City”), Gatlinburg and Pittman Center. On September 24, 2003, the Company submitted a filing to amend its *Petition* to exclude two areas located on Wears Valley Road in Sevierville presently served by Integrated Resources Management Utility, Inc. (“IRM”).

In its *Petition*, Tennessee Wastewater contended that Sevier County and the City of Pigeon Forge had declined to provide wastewater treatment in the requested service area. Tennessee Wastewater submitted a letter dated February 12, 2003 from John Jagger, City of Pigeon Forge Community Development Director, stating that the City of Pigeon Forge would take a neutral stance on this matter. Tennessee Wastewater also submitted a March 6, 2003 letter from Larry Waters, Sevier County Executive, stating that Sevier County did not presently have plans to provide municipal or county sewers into unincorporated areas of the county.

The *Petition* was noticed for consideration and came before the voting panel assigned to this docket at the October 21, 2003 Authority Conference. During that Conference, the panel

voted unanimously to approve the *Petition* thereby amending Tennessee Wastewater's CCN and expanding its service area as described in the *Petition*. The Order reflecting the Authority's action was issued on March 24, 2004.<sup>2</sup>

On April 7, 2004, East Sevier filed a *Petition for Reconsideration, Intervention, and/or for a Declaratory Order* ("*Petition for Reconsideration*") in Docket No. 03-00329. In its *Petition for Reconsideration*, the Utility District asserted an interest in the service area granted to Tennessee Wastewater and stated that the Utility District did not receive notice of the October 21, 2003 Hearing on Tennessee Wastewater's *Petition*. The Utility District asserted that it was entitled to notice and that had it received such notice it would have timely intervened in Docket No. 03-00329.<sup>3</sup>

East Sevier also asserted that it has statutory authority to provide service beyond its territorial boundaries and that it intends to continue doing so. It also alleged that Tennessee Wastewater was representing to customers, prospective customers and to East Sevier's engineers that no entity other than Tennessee Wastewater is allowed to provide wastewater treatment services to any customers in the remaining areas of Sevier County without Tennessee Wastewater's written consent. For these reasons, East Sevier asked for reconsideration of the Authority's decision to grant the amendment to Tennessee Wastewater's CCN.

Tennessee Wastewater filed an objection to the Utility District's *Petition for Reconsideration* on April 19, 2004. Tennessee Wastewater asserted East Sevier was not a party to Docket No. 03-00329 and therefore had no standing to file for reconsideration of the Authority's final order. Tennessee Wastewater further asserted that East Sevier lacked standing

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<sup>2</sup> *Order Approving Petition of On-Site Systems, Inc to Amend Its Certificate of Public Convenience and Necessity* (March 24, 2004). The voting panel consisted of Director Sara Kyle, Director Pat Miller, and Director Ron Jones

<sup>3</sup> *Petition for Reconsideration, Intervention, and/or for a Declaratory Order*, pp. 6-7 (April 7, 2004).

because Tennessee Wastewater's *Petition* excludes the area currently served by East Sevier and East Sevier had never sought to include within its boundaries the area Tennessee Wastewater requested in the amendment to the CCN.

At a regularly scheduled Authority Conference held on April 26, 2004, the voting panel assigned to this docket considered and voted unanimously to grant the Utility District's request to intervene and the *Petition for Reconsideration*. The panel found from the record in Docket No. 03-00329 that Tennessee Wastewater did not provide actual notice of the *Petition* to East Sevier. The panel further found that East Sevier did not receive notice of the proceedings that were held on October 21, 2003 and, therefore, should not be prevented from seeking relief in Docket No. 03-00329. In the interests of justice, the panel determined that East Sevier be allowed to intervene and its *Petition for Reconsideration* be considered as properly filed. The panel further voted to appoint General Counsel or his designee to serve as Hearing Officer to render an initial order on the merits of Tennessee Wastewater's original petition and requested the Chairman of the Authority to consider consolidation of this docket with Docket No. 04-00045.<sup>4</sup> Docket No. 04-00045 was thereafter administratively consolidated into this docket.

#### **Travel of Docket No. 04-00045**

On February 11, 2004, Tennessee Wastewater filed another proposed amendment to its CCN seeking to include the planned growth area of Pigeon Forge within its service area. The Company's February 11, 2004 filing was assigned Docket No. 04-00045. On March 1, 2004, Tennessee Wastewater filed in Docket No. 03-00329 a copy of a letter from the Pigeon Forge City Manager to Tennessee Wastewater advising that the City had no present plans to provide sewer service in its urban growth area within the next twelve (12) months and that the City's

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<sup>4</sup> See *Order Reopening Docket, Granting Intervention to East Sevier Utility District, Granting Petition for Reconsideration and Appointing Hearing Officer on the Merits* (October 25, 2004)

present policy was to provide sewer service only to incorporated areas.<sup>5</sup> The Utility District filed a *Petition to Intervene* in Docket No. 04-00045 on March 15, 2004.<sup>6</sup> The City filed its *Petition to Intervene and Motion to Continue* in Docket No. 04-00045 on March 19, 2004. During an Authority Conference held on March 22, 2004, the voting panel assigned to Docket No. 04-00045 voted unanimously to grant the interventions of the Utility District and the City in that docket and to appoint General Counsel or his designee as Hearing Officer to hear this matter on the merits.<sup>7</sup>

### **Travel of the Consolidated Dockets**

On May 10, 2004, the Hearing Officer issued a Notice of Filing requesting memoranda of law from the parties on the following issue:

Whether the grant of a Certificate of Convenience and Necessity to a public utility (as defined by Tenn. Code Ann. § 65-4-101) providing wastewater treatment services in an identified service area operates to exclude other public utilities or non-utilities (as defined by Tenn. Code Ann. § 65-4-101) from providing wastewater treatment services in the identified service area.

The Utility District filed the requested memorandum of law on May 18, 2004, offering its conclusion that “the grant of a CCN to a public utility providing wastewater treatment services in an identified service area does not operate to exclude other public utilities or non-utilities from providing wastewater treatment services in the identified service area.”<sup>8</sup> The City also filed its memorandum of law on May 18, 2004, offering the following conclusion:

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<sup>5</sup> Letter from Charles Pickney Jr., President, Tennessee Wastewater Systems, Inc. to Hal Novak, Chief, Energy and Water Division, Tennessee Regulatory Authority [unnumbered attachment] (March 1, 2004)

<sup>6</sup> In its *Petition for Reconsideration* filed in Docket No. 03-00329, East Sevier requested, in the alternative, the entry of a declaratory order that the Authority’s March 24, 2004 Order did not provide Tennessee Wastewater with exclusive rights to provide services in the remainder of Sevier County. Because the exclusivity of the CCN is essentially the same issue pending before the Authority in Docket No. 04-00045, East Sevier requested that any action on its reconsideration or the request for a declaratory order be stayed pending the outcome of the contested case hearing in Docket No. 04-00045.

<sup>7</sup> See *Order Granting Petitions to Intervene and Appointing a Hearing Officer* (May 13, 2004).

<sup>8</sup> *East Sevier County Utility District’s Memorandum of Law in Response to May 10, 2004 Notice of Filing and Status Conference*, p. 2 (May 18, 2004)

It is well-settled (and agreed upon by all parties hereto) that a municipality has absolute power to provide utility service within an area that it has annexed. There is significant risk, however, that a municipality may be excluded from extending its utility services into an urban growth area slated to be annexed in the future if a public utility holds a certificate that covers the urban growth area. This issue is within the Authority's discretion to consider when deliberating on a certificate application, and the Authority should exercise such discretion in the current action.<sup>9</sup>

In its memorandum of law filed on May 18, 2004, Tennessee Wastewater offered the following conclusion:

To the extent the grant of a certificate prevents non-utilities as defined in T.C.A. § 65-4-101 from providing sewer service within the Company's certificated service area, such exclusion arises from the operation of other statutes governing such non-utilities and existing case law. Such questions are beyond the jurisdiction of the Authority and are not appropriate for consideration in this proceeding.

On May 19, 2004, Tennessee Wastewater filed its *Motion to Dismiss* contending that the Utility District was invalidly created, that its corporate existence is therefore void, and that it has no legal interest in this docket.

A Status Conference was held on May 20, 2004, for the purpose of establishing a procedural schedule. During the Status Conference the Hearing Officer requested a joint filing from the parties identifying the issues to be tried at the Hearing on the merits of this matter.<sup>10</sup> A scheduling order was entered on May 25, 2004.

On June 2, 2004 the Company filed its *Supplemental Memorandum of Law in Support of Motion to Dismiss East Sevier County Utility District as an Intervenor* ("Supplemental Memorandum"). On June 15, 2004, the Utility District filed its *Memorandum of Law and Response to the Motion by Tennessee Wastewater Systems, Inc. to Dismiss East Sevier County Utility District as an Intervenor* ("Response"). The Company filed its *Reply of Tennessee*

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<sup>9</sup> *Memorandum of Law by the City of Pigeon Forge*, pp. 6-7 (May 18, 2004)

<sup>10</sup> Transcript of Proceedings, p. 32 (May 20, 2004).

*Wastewater Systems, Inc to Memorandum of Law and Response of East Sevier County Utility District to Motion to Dismiss ("Reply")* on June 24, 2004.

Pursuant to the May 25, 2004 scheduling order, a hearing was held on June 29, 2004 regarding the *Motion to Dismiss*. The Hearing Officer heard argument from counsel for the Utility District and the Company—the City offered some commentary but declined to take a position regarding the *Motion*.<sup>11</sup>

On June 23, 2004, the parties filed the requested *Joint Statement of Issues* and listed the following issues:

1. The impact of the TRA's issuance of the certificates on the City's authority and ability to provide sewer service within the certificates' territories, which territories are outside the City's corporate limits but within its urban growth boundaries in which the City's planning commission is the regional planning authority.
2. The impact of the TRA's issuance of the proposed certificates on the District's authority to provide sewer service within the proposed certificated territory.
3. The authority of the TRA to design the territory subject to the certificates so as to not prohibit the City from providing sewer service within the City's urban growth boundaries.
4. Does the TRA have the authority to condition the grant of the certificates to insure that the District's statutory authority to provide sewer service within the proposed certificated area is not affected, and to further insure that the grant of such certificates will impose no consequence, nor allow the imposition of any consequence, on the District for the actual provision of such services?
5. Whether the public convenience and necessity requires the grant of the certificates sought by the Company in this proceeding for the entire geographic territory sought in the petitions.

The pre-filed testimony of Charles Pickney, Jr. and John Raymond Jagger was submitted by Tennessee Wastewater and the City of Pigeon Forge, respectively, on July 1, 2004. Also, on

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<sup>11</sup> Transcript of Proceedings, pp. 15, 39 (June 29, 2004)

July 1, 2004, IRM filed a petition to intervene in this matter. On July 9, 2004, the Hearing Officer entered orders granting IRM's petition and denying Tennessee Wastewater's earlier *Motion to Dismiss* the Utility District as an intervenor.<sup>12</sup> The Hearing Officer declined to consider the Utility District's legal standing in this matter as challenged by the *Motion to Dismiss* because such a consideration would have amounted to a determination of whether the Utility District's creation is void or a determination of whether the Utility District seeks to exercise powers not conferred upon it by law. The Hearing Officer concluded that to make either such determination would violate the *Quo Warranto* Statute, Tenn. Code Ann. § 29-35-101(3)-(4) (2000), and therefore denied the *Motion to Dismiss* the Utility District.<sup>13</sup>

#### **THE JULY 13, 2004 HEARING**

The Hearing on the merits of these dockets was held on July 13, 2004. The following counsel appeared on behalf of their respective clients: Mr. Donald L. Scholes for Tennessee Wastewater; Mr. Mark Jendrek on behalf of the Utility District; Mr. Charles B. Welch on behalf of the Utility District and IRM; and Mr. G. Scott Thomas and Mr. Gregory T. Young for the City. No other persons or entities sought to intervene in this proceeding. The parties stipulated prior to the Hearing to the pre-filed testimony of John Raymond Jagger, Director of Community Development for the City of Pigeon Forge.<sup>14</sup>

Company President Charles Pickney testified for Tennessee Wastewater. Mr. Pickney stated that the Company is operating approximately forty-eight (48) decentralized wastewater treatment systems statewide.<sup>15</sup> Mr. Pickney stated that the Company has approximately two

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<sup>12</sup> See *Order Granting Petition to Intervene* (July 9, 2004) and *Order Denying Motion to Dismiss East Sevier County Utility District as an Intervenor* (July 9, 2004).

<sup>13</sup> See *Order Denying Motion to Dismiss East Sevier County Utility District as an Intervenor*, p. 9 (July 9, 2004).

<sup>14</sup> Transcript of Proceedings, p. 4 (July 13, 2004). See also *Direct Testimony of John Raymond Jagger on Behalf of the City of Pigeon Forge* (July 2, 2004).

<sup>15</sup> Transcript of Proceedings, p. 13 (July 13, 2004).

hundred (200) customers in the Pigeon Forge “growth area” and that the Company had the present capability of providing service to two thousand (2000) customers in that same area.<sup>16</sup> Mr. Pickney stated that the Company inadvertently failed to identify the City’s urban growth area as part of the requested expansion of the Company’s service area in its original filing with the Authority in Docket No. 03-00329 and that the omission necessitated the filing of an amendment to the *Petition* (Docket No. 04-00045).<sup>17</sup>

Mr. Pickney stated that the Company has asked for a countywide expansion of its CCN for Sevier County based on what the Company perceives as “significant growth” in the need for the Company’s services in Sevier County and the expectation that, absent the granting of a countywide expansion of its CCN, the Company would be required to file multiple CCN requests for individual projects in Sevier County and would necessarily incur additional delay and expense in seeking the individual authorizations to expand its service area.<sup>18</sup>

In response to questioning from the Hearing Officer, Mr. Pickney stated that the Company does not presently intend to provide wastewater treatment service to facilities near or contiguous to the territorial boundaries of the Utility District.<sup>19</sup> Mr. Pickney stated that the Company was planning to provide service to approximately five systems within the City’s urban growth boundaries.<sup>20</sup> Mr. Pickney stated that another reason for requesting an expansion of the Company’s service area to cover all of Sevier County, except for those areas noted, is that the expanded service area would provide greater convenience to the Company and the general contractors with whom the Company works in the administration of various projects.<sup>21</sup>

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<sup>16</sup> Transcript of Proceedings, pp. 13-14 (July 13, 2004)

<sup>17</sup> *Id.* at 13

<sup>18</sup> *Id.* at 14-17, 41, 44.

<sup>19</sup> *Id.* at 24, 26.

<sup>20</sup> *Id.* at 24, 26. These five systems are identified in the Company’s *Late-Filed Exhibit 1*, p. 2 (July 16, 2004).

<sup>21</sup> Transcript of Proceedings, pp. 26-27 (July 13, 2004)

In response to cross-examination by Counsel for the Utility District and IRM, Mr. Pickney stated that Tennessee Wastewater operates with one employee managing a number of subcontractors.<sup>22</sup> Mr. Pickney stated that he is the only employee of Tennessee Wastewater.<sup>23</sup> His duties with the Company include meeting with developers, performing system maintenance and providing training on the design and repair of wastewater treatment systems.<sup>24</sup> Mr. Pickney stated that the Company's subcontractors perform the day-to-day operations of Company-owned systems.<sup>25</sup>

Mr. Pickney testified that the Company's subcontractors include several "large maintenance organizations" located in East Tennessee including Southeast Environmental Engineering operated by Mike Hines.<sup>26</sup> Mr. Pickney stated that the Company provides training to its subcontractors.<sup>27</sup> Mr. Pickney stated that some of the Company-trained subcontractors are under exclusive contracts with the Company in order to protect the Company from competitors gaining access to its operation and maintenance methods.<sup>28</sup>

According to Mr. Pickney, the Company's customers are typically entities seeking to develop property that other wastewater treatment service providers either cannot or will not service.<sup>29</sup> Mr. Pickney stated that the Company does not apply for a CCN without the knowledge of the developer or property owner.<sup>30</sup> Mr. Pickney explained that the Company typically conducts business by contracting with private party developers willing to provide a wastewater treatment system built to Tennessee Wastewater's engineering and construction

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<sup>22</sup> Transcript of Proceedings, p. 34 (July 13, 2004).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 63.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 34, 36. Sevier County is located in East Tennessee

<sup>27</sup> *Id.* at 35.

<sup>28</sup> *Id.* at 58-59

<sup>29</sup> *Id.* at 39-40

<sup>30</sup> *Id.* at 47.

standards and willing to hire the engineering, construction and other personnel necessary to install the system to Company specifications. Mr. Pickney explained that, although the Company operates many different types of systems, the majority of the systems it operates in Tennessee are sand-gravel filter treatment systems.<sup>31</sup> Once the system is constructed to standards satisfactory to the Company, the Company acquires the system and thereafter operates and maintains it through its Company-trained subcontractors.<sup>32</sup> Mr. Pickney stated that the Company makes no capital contribution towards the construction of the system.<sup>33</sup> Under cross-examination by counsel for the City, Mr. Pickney stated that the Company receives forty cents (\$.40) per customer per month to cover miscellaneous costs including the administrative costs associated with obtaining Authority approval of expansions to its CCN.<sup>34</sup>

After the Company had concluded the presentation of its case, counsel for the City stated that it would not offer any additional evidence beyond the previously stipulated testimony of the City's Director of Community Development.<sup>35</sup> Neither the Utility District nor IRM presented direct evidence at the Hearing. At the conclusion of the Hearing, the Hearing Officer ordered the parties to submit post-hearing briefs by August 13, 2004, and reply briefs on or before August 27, 2004.<sup>36</sup> The Hearing Officer asked that in their briefs the parties address the meaning of the term "utility water service" as set forth in Tenn. Code Ann. § 6-51-301 (1998) and discuss whether the present and future public convenience and necessity require that Tennessee Wastewater's service area be expanded to include the entirety of Sevier County with the exception of the areas noted in the Company's *Petition*.<sup>37</sup>

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<sup>31</sup> Transcript of Proceedings, p 43 (July 13, 2004).

<sup>32</sup> *Id.* at 38-39, 42, 58-59.

<sup>33</sup> *Id.*, at 39.

<sup>34</sup> *Id.* at 56-58.

<sup>35</sup> *Id.* at 64

<sup>36</sup> *Id.* at 74

<sup>37</sup> *Id.* at 71-72

On July 16, 2004, the Company filed an exhibit<sup>38</sup> to Mr. Pickney's testimony listing and describing Company projects pending in Sevier County as follows:

<u>Development Name</u>	<u>Acreage</u>	<u>Number of Lots</u>	<u>Planning Area</u>
Black Bear Ridge Expansion	~20	20	Pigeon Forge
Legacy Laurel Branch	~30	45	Pigeon Forge
Legacy Mountain	350+	400+	Sevier County
Legacy The Preserve	100+	65	Pigeon Forge
Starr Crest II Phase 4	11	17	Pigeon Forge
Timber Tops Rental Center	4	Commercial	Pigeon Forge
Trailhead	17	80	Sevier County

#### **TENNESSEE STATUTES RELEVANT TO THE ISSUES IN THESE DOCKETS**

No public utility is permitted to begin construction or operation of a new public utility facility or service before obtaining the approval of the TRA. The procedure for obtaining such approval is outlined in Tenn. Code Ann. § 65-4-201(a) (2004), which reads in pertinent part as follows:

No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate; provided, however, that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations, or for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another public utility, or for substitute or additional facilities in or to territory already served by it.

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<sup>38</sup> Late-Filed Exhibit 1, p. 2 (July 16, 2004).

Tenn. Code Ann. § 65-4-203(a) (2004) states:

The authority shall not grant a certificate for a proposed route, plant, line, or system, or extension thereof, which will be in competition with any other route, plan, line, or system, unless it shall first determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provisions of this part.<sup>39</sup>

Other statutes relevant to the consideration of the issues raised in this docket include Tenn. Code Ann. § 6-51-301 (1998) and § 7-51-401 (1998). Tenn. Code Ann. § 6-51-301 (1998) provides in part:

(a)(1) Notwithstanding any other law, public or private, to the contrary, no municipality may render utility water service to be consumed in any area outside its municipal boundaries when all of such area is included within the scope of a certificate or certificates of convenience and necessity or other similar orders of the Tennessee regulatory authority or other appropriate regulatory agency outstanding in favor of any person, firm or corporation authorized to render such utility water service. If and to the extent that a municipality chooses to render utility water service to be consumed within its municipal boundaries when all or part of such area is included within the scope of a certificate or certificates of convenience and necessity or other similar orders of the Tennessee regulatory authority or other appropriate regulatory agency outstanding in favor of any person, firm or corporation authorized to render such utility water service, then the municipality and such person, firm or corporation shall attempt to reach agreement in writing for allocation and conveyance to the municipality of any or all public utility functions, rights, duties, property, assets, and liabilities of such person, firm or corporation so affected that justice and reason may require. If, within a reasonable time, the parties cannot agree in writing on allocation and conveyance, then either party may petition the chancery court of the district in which such area is located for a determination of value and damages suffered by such person, firm or corporation as a result of such municipal choice.

(a)(2) Such proceeding shall be conducted according to the laws of eminent domain, title 29, chapter 16, and shall include a determination of actual damages, incidental damages, and incidental benefits, as provided for therein, but in no event shall the amounts so determined exceed the replacement cost of the facilities.

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<sup>39</sup> Tenn. Code Ann. § 65-4-203(a) (2004).

Tenn. Code Ann. § 7-51-401(a) (1998) states:

Except as provided in § 7-82-302, each county, utility district, municipality or other public agency conducting any utility service specifically including waterworks, water plants and water distribution systems and sewage collection and treatment systems is authorized to extend such services beyond the boundaries of such county, utility district, municipality or public agency to customers desiring such service.<sup>40</sup>

Tenn. Code Ann. § 7-51-401(c) (1998) states:

No such county, utility district, municipality or public utility agency shall extend its services into sections of roads or streets already occupied by other public agencies rendering the same service, so long as such other public agency continues to render such service.

### **POSITIONS OF THE PARTIES**

*The Post-Hearing Brief of Tennessee Wastewater Systems, Inc* (“*Company’s Brief*”), *The City of Pigeon Forge’s Post Hearing Brief* (“*City’s Brief*”), and the Utility District’s *Memorandum of Law in Opposition to the Grant of a Certificate of Convenience and Necessity for the Geographic Area Known as Sevier County, Tennessee* (“*Utility District’s Brief*”) were each filed on August 13, 2004. The *Reply Brief of Tennessee Wastewater Systems, Inc.* (“*Company’s Reply*”), *The City of Pigeon Forge’s Post-Hearing Reply Brief* (“*City’s Reply*”), and the *Reply Memorandum of Law in Opposition to the Grant of a Certificate of Convenience and Necessity for the Geographic Area Known as Sevier County, Tennessee* (“*Utility District’s Reply*”) were each filed on August 27, 2004. Pursuant to the Hearing Officer’s directive, the briefs addressed the issue of whether Tenn. Code Ann. § 6-51-301(a) (2004) would prohibit a municipality from providing sewer service outside its boundaries where the area to be served is

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<sup>40</sup> Tenn Code Ann § 7-82-302(g) (1998) provides, under certain conditions described therein, incorporated cities and towns the prior right with respect to Utility Districts to extend water, sewer or other utilities.

included within the scope of the service area requested by the Company in its *Petition*. The parties' briefs also addressed the central issue of whether the present and future public convenience and necessity require or will require the grant of a countywide CCN to the Company as requested in the *Petition*.

### **Tennessee Wastewater**

In its post-hearing brief the Company offered that the plain meaning of the term "utility water service" as used in Tenn. Code Ann. § 6-51-301(a) (1998) "can only refer to a utility which provides water service."<sup>41</sup> Based on this conclusion the Company argued that this statute "cannot be construed to apply to the service area of a sewer utility."<sup>42</sup> In support of its argument regarding the construction of this statute the Company pointed out that in subsection (d) of the statute the terms "natural or artificial gas" and "telephone service" are specifically excluded from the term "utility services."<sup>43</sup> The Company stated that these exclusions show the Legislature's "ability to clearly indicate by express language when it intended to use the term utility to include all utility services and when it intended to address specific utility services."<sup>44</sup> The Company cited the conclusion reached in Attorney General Opinion No. 04-134 that the term "water utility service" does not include a sanitary sewer system in support of its assertion that the term "utility water service" as used in Tenn. Code Ann. § 6-51-301(a) (1998) does not include sewer service.<sup>45</sup>

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<sup>41</sup> *Company's Brief*, p. 2 (August 13, 2004)

<sup>42</sup> *Id*

<sup>43</sup> *Id* at 3. Tenn. Code Ann. § 6-51-301(d) (1998) provides in pertinent part. "If and to the extent that a municipality incorporated after January 1, 1972, and which has been incorporated for two (2) years or longer chooses to render any utility services (other than the furnishing of natural or artificial gas or telephone service) within its municipal boundaries . . . ."

<sup>44</sup> *Company's Brief*, p. 3 (August 13, 2004).

<sup>45</sup> *Company's Reply*, pp. 1-2 (August 27, 2004)

The Company noted that the Attorney General's Opinion suggested that Tenn. Code Ann. § 7-51-401(c) (1998) might prohibit a city from extending sewer service beyond its borders and into the certificated service area of a private utility.<sup>46</sup> The Company argued that this statute is not applicable to private utilities because it refers to "public agencies" which the Company concluded refers only to political subdivisions of the State of Tennessee.<sup>47</sup> The Company supported its construction of the term "public agencies" by pointing out that, "Each of the entities named in the sentence preceding the term 'public utility agency' in T.C.A. § 7-51-401(c), 'county, utility district, municipality,' are political subdivisions of the State of Tennessee."<sup>48</sup> The Company further supported its argument on this point by noting the requirement of subsection (b) of Tenn. Code Ann. § 7-51-401 (1998) which requires that service provided outside of the boundaries of these various entities must be self-supporting.<sup>49</sup> The Company asked in its reply brief, "Is the Authority's denial of a certificate to provide sewer service on the grounds that a municipality might someday want to serve the same area without annexing it in the public interest?" and answered in the negative stating that "no statute or case prohibits the municipality from extending sewer service into the unserved area of a certificated utility when the municipality does not annex such area."<sup>50</sup>

In its post-hearing brief the Company also addressed the applicability of Tenn. Code Ann. § 7-82-301(a) (1998) as discussed by the Court of Appeals in *Lynnwood Utility Co. v. The City of Franklin, Tennessee*,<sup>51</sup> pointing out that, although the *Lynnwood* Court stated in its

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<sup>46</sup> *Company's Reply*, p. 2 (August 27, 2004). Tenn. Code Ann. § 7-51-401(c) (1998) states: "No such county, utility district, municipality or public utility agency shall extend its services into sections of roads or streets already occupied by other public agencies rendering the same service, so long as such other public agency continues to render such service."

<sup>47</sup> *Id.* at 2-3

<sup>48</sup> *Id.* at 3

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Lynnwood Utility Co. v. The City of Franklin, Tennessee*, 1990 Tenn. App. Lexis 228, 1990 WL 38358 (Tenn. Ct. App. 1990)

opinion that it assumed that the term “utility water service” includes sewer service, the Court declined to include this assumption in its holding.<sup>52</sup>

The Company cited the Court of Appeal’s decision in *Westland Drive Service Co. v. Southern Realty Investors*<sup>53</sup> as support for the Company’s conclusion that the City will have the continuing right to provide sewer service to any portion of the area the Company seeks to include in its authorized service area so long as the Company has not already established service to the portion of its service area that the City seeks to enter.<sup>54</sup> The Company pointed to the *Westland* Court’s finding that a private water utility was not able to rely on Tenn. Code Ann. § 6-51-301(a)(1) (1998) in its attempt to force an apartment complex located in its authorized service area to disconnect from the county utilities board’s facilities and connect to the private water utility’s system.<sup>55</sup>

In its post-hearing brief the Company pointed out that the intervening parties to this docket did not introduce “evidence objecting to the grant of the certificates sought by the Company.”<sup>56</sup> The Company stated the uncontradicted testimony of its witness at the Hearing “should be entitled to controlling weight in determining whether the present or future public convenience and necessity requires the issuance of the certificates sought.”<sup>57</sup>

The Company stated that the record demonstrates that a public need exists for it to be granted a countywide expansion to its CCN.<sup>58</sup> The Company pointed out that it was previously granted thirteen (13) separate extensions of its service area all of which would fall within the

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<sup>52</sup> *Company’s Brief*, p. 3 (August 13, 2004). See *Lynnwood Utility Co v The City of Franklin, Tennessee*, 1990 Tenn App Lexis 228, \*7, 1990 WL 38358, \*3 (Tenn Ct App. 1990).

<sup>53</sup> *Westland Drive Service Co v Southern Realty Investors*, 558 S.W 2d 439 (Tenn. Ct App 1977)

<sup>54</sup> *Company’s Brief*, p. 4 (August 13, 2004) See *Westland Drive Service Co, Inc v Citizens & Southern Realty Investors*, 558 S.W.2d 439 (Tenn Ct. App 1977)

<sup>55</sup> *Company’s Brief*, p. 4 (August 13, 2004) See *Westland Drive Service Co, Inc v Citizens & Southern Realty Investors*, 558 S.W 2d 439, 441 (Tenn Ct App 1977)

<sup>56</sup> *Company’s Brief*, p. 5 (August 13, 2004)

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 6-7 (August 13, 2004)

geographic area designated in the *Petition*.<sup>59</sup> The Company pointed to testimony showing that one of eight developments potentially needing wastewater treatment services during the course of this proceeding opted for a septic tank system due to “delay in approval of the certificates sought in this case.”<sup>60</sup> The Company argued that, “When the company has shown that a public need exists for multiple decentralized sewer systems in a geographic area, it only makes sense to apply for a larger geographic area in one proceeding.”<sup>61</sup>

The Company stated in its post-hearing brief that obtaining a countywide CCN for Sevier County would accelerate the approval process for local developers before the local planning commission because it would enable the Company to provide local developers with a “sewer availability letter” without having to apply for a separate expansion of its service area.<sup>62</sup> The Company also pointed out that a countywide CCN would enable it to avoid the costs associated with applying for separate expansions to its CCN.<sup>63</sup> The Company also stated that the practice of filing petitions to expand its service area “on a project by project basis . . . would practically preclude the Company from being able to do long term planning and to construct larger, regional facilities that serve multiple developments in a geographic area” and that “the public would then not receive the benefit of the lower rates such larger systems can offer.”<sup>64</sup>

The Company argued in its post-hearing brief that one sewer utility servicing customers in a given geographic area is more efficient than several sewer utilities servicing such customers because “each sewer provider must have its own personnel or contracts to provide maintenance and operational services to the systems thereby increasing the overall maintenance and

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<sup>59</sup> *Company's Brief*, p. 6 (August 13, 2004).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 8.

<sup>62</sup> *Id.* at 7.

<sup>63</sup> *Id.* at 8.

<sup>64</sup> *Company's Reply*, p. 6 (August 27, 2004).

operations cost of service to the public.”<sup>65</sup> On this point, the Company also stated “the maintenance personnel used by the Company can perform regular maintenance more efficiently on several systems within the same area than on systems scattered in different locations.”<sup>66</sup>

The Company pointed out in its reply brief that the forty cents (\$.40) included in its monthly rate to cover miscellaneous costs covers more than the administrative costs associated with acquiring expansions of its service area and includes “every expense the Company has not accounted for elsewhere in its rate structure.”<sup>67</sup>

The Company questioned whether competition is an appropriate consideration in this docket.<sup>68</sup> However, the Company argued in its post-hearing brief that the grant of a countywide CCN is consistent with the objective of fostering competition between sewer utilities in Sevier County because, upon approval of the *Petition*, developers throughout Sevier County would immediately have available another choice for the provision of sewer service.<sup>69</sup>

The Company stated in its post-hearing brief that because the Authority has no jurisdiction over the City and the Utility District, and because the City and the Utility District have independent statutory authority to provide the services they offer, the Authority should limit its consideration to the evidence in the record relating to whether the Company has shown that the present or future public convenience and necessity requires approval of the *Petition*.<sup>70</sup> The Company reiterated that the grant of the *Petition* would not preclude the Utility District or the City from expanding their respective borders to provide service within the area sought by the

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<sup>65</sup> *Company's Brief*, p. 9 (August 13, 2004)

<sup>66</sup> *Id.*

<sup>67</sup> *Company's Reply*, p. 4 (August 27, 2004).

<sup>68</sup> *Company's Brief*, pp. 12-13 (August 13, 2004)

<sup>69</sup> *Id.* at 9-11.

<sup>70</sup> *Id.* at 11-14

Company.<sup>71</sup> On this point the Company also reiterated that the City “would have the prior right over the Company to extend service even in an area in which the City has not annexed.”<sup>72</sup>

The Company took issue with assertions that its systems are self-contained and designed primarily to meet the particular needs of individual developments stating that such is not always the case.<sup>73</sup> The Company also took issue with the assertion that granting the *Petition* would be inconsistent with the City’s urban growth plan.<sup>74</sup> In support of the position that its *Petition* is not at odds with the City’s urban growth plan, the Company pointed to a statement in the City’s Regional Growth Plan that “Pigeon Forge will not provide public sewer outside of its corporate limits.”<sup>75</sup> The Company offered that, should the City ever annex areas in which the Company provides service, the City will save construction costs it would otherwise incur in providing service to the newly annexed areas.<sup>76</sup>

The Company submitted that it has the requisite managerial, financial and technical ability to provide countywide wastewater treatment service in Sevier County and that it has provided evidence demonstrating a countywide public need for its service.<sup>77</sup>

### **The City**

The City offered that it is a well-settled point of law that municipalities have the power to extend sewer service to areas outside their corporate boundaries.<sup>78</sup> The City stated that it has already extended service past its boundaries and into its designated urban growth area.<sup>79</sup>

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<sup>71</sup> *Company’s Brief*, p. 13 (August 13, 2004).

<sup>72</sup> *Id.*

<sup>73</sup> *Company’s Reply*, p. 5 (August 27, 2004).

<sup>74</sup> *Id.* at 6

<sup>75</sup> *Id.* citing *Direct Testimony of John Raymond Jagger on Behalf of the City of Pigeon Forge*, Exhibit 1 at 11 (July 2, 2004).

<sup>76</sup> *Company’s Reply*, p. 6 (August 27, 2004)

<sup>77</sup> *Company’s Brief*, pp. 13-14 (August 13, 2004) *Company’s Reply*, pp. 7-8 (August 27, 2004).

<sup>78</sup> *City’s Brief*, p. 4 (August 13, 2004) citing *Patterson v. City of Chattanooga*, 241 S.W.2d 291, 294 (Tenn. 1951).

<sup>79</sup> *Id.* at 5.

The City pointed out that the Court of Appeals in the *Lynnwood* case assumed that the term “utility water service” includes sewer service within the scope of Tenn. Code Ann. § 6-51-301 (1998).<sup>80</sup> The City relied on this construction of “utility water service” for its position that, if the Company is granted a CCN covering most of Sevier County and including the area located outside the City’s current boundaries and identified as the City’s urban growth area, this statute would operate to exclude the City from extending service into its urban growth area.<sup>81</sup> Based on its offered construction of Tenn. Code Ann. § 6-51-301 (1998), the City argued that the Authority should not grant the Company a countywide CCN.<sup>82</sup>

The Court of Appeals ruled in *Westland* that a 1974 amendment to Tenn. Code Ann. § 6-51-301 (providing that no municipality may render utility water service to be consumed in an area outside its boundaries when such area is included within the scope of a CCN held by another entity) did not apply retroactively to a 1972 agreement between a utility board and an apartment complex for the provision of sewer services.<sup>83</sup>

The City pointed to the Court of Appeals’ finding in *Westland* as authority for the proposition that Tenn. Code Ann. § 6-51-301 (1998) would apply prospectively and would, as a matter of law, preclude the City from providing sewer service to an area outside its municipal boundaries if the area is within the scope of a CCN.<sup>84</sup>

The City argued that, read together, the *Lynnwood* and *Westland* decisions imply that Tenn. Code Ann. § 6-51-301(a) (1998) “excludes a municipality from providing sewer service to an area outside its municipal boundaries when such area is already within the scope of a

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<sup>80</sup> *City’s Brief*, p. 2 (August 13, 2004)

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Westland Drive Service Co., Inc. v. Citizens & Southern Realty Investors*, 558 S.W.2d 439, 441 (Tenn. Ct. App. 1977).

<sup>84</sup> *City’s Brief*, p. 6 (August 13, 2004) See *Westland Drive Service Co. v. Citizens & Southern Realty Investors*, 558 S.W.2d 439, 441 (Tenn. Ct. App. 1977).

certificate of convenience or necessity.”<sup>85</sup> The City stated that this exclusion from its urban growth “would be by operation of law” given that the “exclusivity is created under an annexation statute in the Tennessee Code.”<sup>86</sup> The City stated further that “if a countywide CCN is granted, the Authority would be powerless to avoid the adverse consequences to the City.”<sup>87</sup>

The City argued that the meaning of “utility water service” was ambiguous and, in support of its suggestion that the term might include sewer service, the City pointed to comments made during the debate that occurred during the Senate’s consideration of the 1974 amendment that ultimately was incorporated into Tenn. Code Ann. § 6-51-301 in which one senator stated

And that’s what this amendment does, and there’s a private water company up in Knox County that it affects, and there may be a handful of other private regulated public utilities servicing water, sewer, gas, what-have-you in the State of Tennessee . . . .<sup>88</sup>

The City pointed out in its post-hearing brief that the legal burden rests with the Company to establish that the present or future public convenience and necessity “require or will require” a countywide CCN.<sup>89</sup> The City stated that the broad nature of the Company’s request requires a correspondingly broad analysis of the impact of the present and future public convenience and necessity.<sup>90</sup> The City argued that the decentralized nature of the Company’s current operations in Sevier County does not support its request for a countywide CCN.<sup>91</sup>

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<sup>85</sup> *City’s Brief*, p. 6 (August 13, 2004).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *City’s Reply*, p. 2 (August 27, 2004) citing Tenn. Sen. J., Vol. II, 88th Gen. Assembly 3264-3266 (March 29, 1974).

<sup>89</sup> *City’s Brief*, p. 7 (August 13, 2004) [emphasis supplied in original] *See also City’s Reply*, p. 4 (August 27, 2004)

<sup>90</sup> *Id.* at 8

<sup>91</sup> *Id.* at 8-9

The City stated that the grant of a countywide CCN would be inconsistent with the state's regional plan for the City's urban growth area.<sup>92</sup> The City explained that, "Urban growth areas by definition are areas identified as future parts of the municipality as development occurs and services are made available."<sup>93</sup> The City stated that, "Municipalities like Pigeon Forge have a vested interest in the orderly and efficient development of the urban growth area, since its utility infrastructure will become part of the City's infrastructure."<sup>94</sup> The City argued that a countywide CCN would promote "chaotic and inefficient development in the urban growth area, thereby undermining the urban growth plan and straining the ability of the City to meet all the utility needs of the residents in the urban growth area."<sup>95</sup>

The City argued that the Company has justified its request for a countywide CCN only upon the conveniences such a CCN would offer to developers and to the Company and upon maintenance efficiencies.<sup>96</sup> The City argued that conveniences enjoyed by the Company or by developers do not necessarily equate with public convenience and necessity.<sup>97</sup> The City argued that the Company's primarily decentralized operations do not support the Company's argument that a countywide CCN would offer enhanced maintenance efficiencies.<sup>98</sup>

The City agreed with the Company's position that the Authority should prioritize getting wastewater treatment service to customers at the most reasonable cost but, contrary to the Company's position, argued that preserving competition among wastewater treatment service providers is also a valid consideration because of the tendency of competition to lower prices.<sup>99</sup>

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<sup>92</sup> *City's Brief*, p. 9 (August 13, 2004)

<sup>93</sup> *Id.* at 10.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* [emphasis supplied in original]

<sup>96</sup> *Id.* at 12. *City's Reply*, pp. 5-6 (August 27, 2004)

<sup>97</sup> *City's Brief*, p. 12 (August 13, 2004). *See also City's Reply*, pp. 5-6 (August 27, 2004).

<sup>98</sup> *City's Brief*, pp. 14-15 (August 13, 2004). *See also City's Reply*, pp. 6-7 (August 27, 2004).

<sup>99</sup> *City's Brief*, p. 16 (August 13, 2004). *See also City's Reply*, pp. 7-8 (August 27, 2004).

The City emphasized that the Authority may appropriately consider the effect of granting a countywide CCN prior to the annexation of territory currently located in the City's urban growth area.<sup>100</sup>

The City concluded that a countywide CCN would prevent the City from providing sewer service beyond its current borders in a manner consistent with the State's regional plan for development in the City's urban growth area and would provide the Company with an unfair competitive advantage against the public interest.<sup>101</sup> The City concluded further that the Company's decentralized, project-specific operations do not warrant a countywide CCN.<sup>102</sup>

### **The Utility District**

In its post-hearing brief the Utility District offered that Tennessee Wastewater bears the burden under Tenn. Code Ann. § 65-4-201 (2004) to show that the public convenience and necessity require or will require the relief requested in the *Petition*.<sup>103</sup> The Utility District pointed out that the testimony offered in support of the *Petition*, while offering that the grant of a countywide CCN would be convenient to the Company and the TRA, did not demonstrate convenience to the public.<sup>104</sup>

The Utility District stated that "given that there have been interventions by the District, an existing utility district, the City of Pigeon Forge [sic], an incorporated city, and IRM, another privately-owned public utility, all apparently willing and interested in providing wastewater treatment services within the geography-based CCN area, neither public convenience nor necessity requires the issuance of the CCN requested by Tennessee Wastewater."<sup>105</sup> On this

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<sup>100</sup> *City's Reply*, pp. 7-8 (August 27, 2004)

<sup>101</sup> *Id.* at 8

<sup>102</sup> *Id.*

<sup>103</sup> *Utility District's Brief*, p. 2 (August 13, 2004). See also *Utility District's Reply*, p. 2 (August 27, 2004).

<sup>104</sup> *Utility District's Brief*, pp. 3-5 (August 13, 2004). See also *Utility District's Reply*, p. 3 (August 27, 2004).

<sup>105</sup> *Utility District's Brief*, p. 6 (August 13, 2004) [emphasis supplied in original]

point the Utility District argued that it cannot be shown that the public convenience and necessity requires a countywide CCN for the provision of wastewater treatment services when the intervenors have shown the willingness to provide such services within the proposed service area.<sup>106</sup>

The Utility District argued that the grant of a countywide CCN to the Company in Sevier County would have an anti-competitive effect on the provision of wastewater treatment services in Sevier County and provide the Company “a competitive advantage for no logical reason.”<sup>107</sup> The Utility District argued that other private wastewater treatment service providers would experience regulatory delays when seeking to serve particular sites in Sevier County that Tennessee Wastewater would avoid as the holder of a countywide CCN.<sup>108</sup> The Utility District stated further that, “Taking away this important right of the public to intervene with respect to any particular development, as will be the result if this broad, geography-based CCN is granted, is a usurpation of the provisions of the Tennessee Rules and Regulations, the Uniform Administrative Procedures Act, and the Tennessee Code, all of which exist for the protection of the public.”<sup>109</sup>

Regarding the meaning of “utility water service” under Tenn. Code Ann. § 6-51-301 (1998), the Utility District stated that the *Lynnwood* Court left the issue open and that, because there is no other reported authority on the issue, “a concise response to the Hearing Officer’s inquiry as to what is meant by the phrase ‘utility water service’ in Tennessee Code Annotated Section 6-51-301 is not possible.”<sup>110</sup>

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<sup>106</sup> *Utility District’s Brief*, pp 6-7 (August 13, 2004).

<sup>107</sup> *Utility District’s Brief*, p 7 (August 13, 2004). *See also Utility District’s Reply*, p 6 (August 27, 2004)

<sup>108</sup> *Utility District’s Brief*, p 8 (August 13, 2004).

<sup>109</sup> *Id* at 4

<sup>110</sup> *Id* at 8-10.

The Utility District pointed out in its reply that, notwithstanding the Company's discussion of the costs it incurs in seeking expansions to its service area, "Tennessee Wastewater does not bear the cost of these applications."<sup>111</sup> In support of this contention the Utility District pointed to a Company response to the data request of the Authority's Staff in Docket No. 01-00423 wherein the Company stated that, "The expenses that On-Site Systems incurs for the filing of petitions are paid by the developer of each territory. Per the contract with the developer, the cost of construction is increased by ten percent (10%) to cover costs such as securing the service area, reviewing the engineering design and inspecting the construction."<sup>112</sup>

The Utility District stated that although the Company claimed that a countywide CCN would result in increased efficiency in the maintenance of its operations, the Company failed to offer proof that such would be the case.<sup>113</sup>

The Utility District concluded that the Company has failed to show that a countywide CCN is required by the present or future public convenience and necessity. To the contrary, the Utility District stated that the evidence shows that a countywide CCN is anti-competitive, not warranted by the decentralized nature of the Company's operations, and counter to the best interest of the public.<sup>114</sup>

### **IRM**

IRM did not submit post hearing briefs.

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<sup>111</sup> *Utility District's Reply*, p. 4 (August 27, 2004).

<sup>112</sup> *Id.*, Exhibit A.

<sup>113</sup> *Id.* at 5

<sup>114</sup> *Utility District's Brief*, p. 10 (August 13, 2004). *See also Utility District's Reply*, pp. 8-9 (August 27, 2004)

## **FINDINGS AND CONCLUSIONS**

In reaching a determination on the merits of Tennessee Wastewater's request to amend its CCN, the issues raised by the parties in their Joint Statement filed on June 23, 2004 are necessarily addressed in the discussion that follows. Most significant is the issue of whether the granting of a CCN to one public utility to provide wastewater treatment services in an identified service area operates as an exclusive grant of authority preventing other public utilities or non-utilities from providing wastewater treatment services in the same identified service area. Central to a resolution of this issue is the task of interpreting the language of those statutes that establish the requirements for obtaining, and conditions for maintaining, authority to operate as a public utility in a specific territory.

The Company pointed to subsection (d) of Tenn. Code Ann. § 6-51-301 (1998) as an example of the Legislature's exclusion of "sewer service" from the meaning of the term "utility service" by pointing out that with this subsection "the legislature demonstrated an ability to clearly indicate by express language when it intended to use the term utility to include all utility services and when it intended to address specific utility services."<sup>115</sup>

Tenn. Code Ann. § 6-51-301(d) (1998) provides in pertinent part: "If and to the extent that a municipality incorporated after January 1, 1972, and which has been incorporated for two (2) years or longer chooses to render any utility services (other than the furnishing of natural or artificial gas or telephone service) within its municipal boundaries . . . ."<sup>116</sup> Following the Company's position that the Legislature has the knowledge and ability to expressly indicate its intent and applying that position to this subsection supports an interpretation contrary to that which the Company asserts.

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<sup>115</sup> *Company's Brief*, p. 3 (August 13, 2004)

<sup>116</sup> Tenn. Code Ann. § 6-51-301(d) (1998)

A reasonable construction of the term “utility services” based on a plain reading of subsection (d) [which excludes only two types of utility service from the term “utility services” (i.e., gas and telephone service)] would be that the term includes all other types of utility services, including sewer services, that were not specifically excluded by the plain language of the subsection. When the Legislature enumerates specific exceptions to a general law, such specific exceptions are construed to exclude all other exceptions.<sup>117</sup> The Hearing Officer concludes that the term “utility services” under Tenn. Code Ann. § 6-51-301(d) (1998) includes wastewater treatment services because, as the Company has pointed out, if the Legislature had intended to exclude wastewater treatment services from the definition of “utility services” it could have expressly done so just as it did with gas and telephone service.

In its post-hearing brief the Company pointed to the Court of Appeals’ *Westland* decision as establishing that the City “would have the legal right to extend sewer service into any unserved area of the Company’s certificated service area even when the City has not annexed such territory.”<sup>118</sup> Contrary to the Company’s position, the City argued that the Court of Appeals’ holding in *Westland* implied that Tenn. Code Ann. § 6-51-301 (1998) would apply prospectively and, as a matter of law, the statute would preclude the City from providing sewer service to an area outside its municipal boundaries if the area is within the scope of a private company’s CCN.<sup>119</sup>

In *Westland*, apartment complex owners entered into an agreement to receive potable water service from a county utilities board in 1972, two years prior to the 1974 amendment of

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<sup>117</sup> *In re A-1 Liquor Distributors*, 269 S.W.2d 785, 788 (Tenn. Ct. App. 1954) citing *Hamilton National Bank v McCanless*, 144 S.W.2d 768 (Tenn. 1940), *Burns v City of Nashville*, 178 S.W. 1053 (Tenn. 1915).

<sup>118</sup> *Company’s Brief*, p. 4 (August 13, 2004).

<sup>119</sup> *City’s Brief*, p. 6 (August 13, 2004).

Tenn. Code Ann. § 6-51-301.<sup>120</sup> The apartment complex was located within the authorized service area of a private water utility.<sup>121</sup> In this case the Tennessee Court of Appeals found that Tenn. Code Ann. § 6-51-301, as with most legislative acts, should be given only prospective, and not retroactive, force.<sup>122</sup> The *Westland* Court did not address the issue of whether the term “water utility service” as used in the statute included wastewater treatment service. The Hearing Officer concludes that to the extent that “water utility service” includes wastewater treatment service, Tenn. Code Ann. § 6-51-301 (1998) would operate prospectively as to municipalities establishing water utility service after April 5, 1974 and prevent such municipalities from providing utility water service in any area outside the boundaries of such municipalities when such area is included within the scope of a CCN granted by the Authority.<sup>123</sup>

Although the *Westland* case did not reach the issue of whether “water utility service” includes wastewater treatment service, the Court of Appeals in the unreported case, *Lynnwood Utility Co. v. The City of Franklin, Tennessee*, 1990 WL 38358, 1990 Tenn. App. Lexis 228 (Tenn. Ct. App. 1990), assumed for the purposes of the case that “water utility service” included “sewer service.”<sup>124</sup> However, the *Lynnwood* Court expressly declined to incorporate its assumption into the holding of the case.<sup>125</sup>

In *Lynnwood*, a private utility sewer service company sued the City of Franklin, Tennessee for compensation after the City of Franklin annexed a portion of the company’s

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<sup>120</sup> *Westland Drive Service Co., Inc v Citizens & Southern Realty Investors*, 558 S W 2d 439, 441 (Tenn. Ct App. 1977). Tenn. Code Ann. § 6-51-301 (2004) was formerly codified at Tenn. Code Ann. § 6-319

<sup>121</sup> *Westland Drive Service Co., Inc v Citizens & Southern Realty Investors*, 558 S W 2d 439 (Tenn Ct. App. 1977)

<sup>122</sup> *Id.* at 441.

<sup>123</sup> *Id.*

<sup>124</sup> *Lynnwood Utility Co v The City of Franklin, Tennessee*, 1990 Tenn App Lexis 228, \*7, 1990 WL 38358, \*3 (Tenn Ct. App 1990).

<sup>125</sup> *Id.*

service area. The private company did not have actual facilities in the ground and held only a CCN authorizing it to provide sewer service to the area in question.<sup>126</sup>

Despite its apparent reluctance to clarify the meaning of the term “water utility service,” the *Lynnwood* Court did expressly address the meaning of the term “facilities” as used in Tenn. Code Ann. § 6-51-301(a)(2) finding that the term “means physical facilities, not a right to construct physical facilities and not a right to serve an area.”<sup>127</sup> The Court found that the private company’s CCN amounted to a non-compensable, “intangible right” under the provisions of Tenn. Code Ann. § 6-51-301.<sup>128</sup> The *Lynnwood* Court did not, however, suggest that its holding altered the plain meaning of the words in the statute which prevent municipalities from providing utility water service to areas covered by a CCN.

On August 20, 2004, the Office of the Attorney General released Opinion No. 04-134 addressing the question of whether a city’s provision of sewer service comes within the meaning of “utility water service” under Tenn. Code Ann. § 6-51-301(a)(1) (1998) and in light of the *Lynnwood* decision.<sup>129</sup> The Opinion notes that the *Lynnwood* Court expressly declined to hold that the term “utility water service” included sewer service and states that the case does not offer binding precedent for including sewer service within that term.<sup>130</sup> The Opinion also notes that the term “utility water service” is not used in any other Tennessee statute.<sup>131</sup> The Opinion points to a number of Tennessee statutes that make use of the terms “water service” and “sanitary sewer service” separately and states that these statutes indicate that water service and sewer service are

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<sup>126</sup> *Lynnwood Utility Co v The City of Franklin, Tennessee*, 1990 Tenn App Lexis 228, \*8, 1990 WL 38358, \*3 (Tenn. Ct. App. 1990)

<sup>127</sup> *Lynnwood Utility Co v The City of Franklin, Tennessee*, 1990 Tenn App Lexis 228, \*7, 1990 WL 38358, \*3 (Tenn. Ct. App. 1990).

<sup>128</sup> *Lynnwood Utility Co v The City of Franklin, Tennessee*, 1990 Tenn App. Lexis 228, \*8, 1990 WL 38358, \*4 (Tenn. Ct. App. 1990)

<sup>129</sup> Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452 (August 20, 2004).

<sup>130</sup> *Id*

<sup>131</sup> *Id* at \*2.

different types of services.<sup>132</sup> The Opinion notes that one of these statutes, Tenn. Code Ann. § 6-54-22(f) (1998), regarding eminent domain procedure, uses the terms “water utility services” and “sewer utility services” to refer to differing services.<sup>133</sup>

Based on the various Tennessee statutes that use the terms “water service” and “sewer service” to refer to different types of service, the Opinion reaches a conclusion that “a court is likely to conclude that the term ‘utility water service’ as used in Tenn. Code Ann. § 6-51-301(a) does not include a sanitary sewer system.”<sup>134</sup> The Hearing Officer assumes that this conclusion was reached, in part, by the Attorney General’s recognition that the terms “utility water service” in Tenn. Code Ann. § 6-51-301(a)(1) (1998) and “water utility service” as used in Tenn. Code Ann. § 6-54-122(f) (1998) have obvious similarities.<sup>135</sup>

The Attorney General’s Opinion demonstrates that the Legislature has clearly distinguished water service and sewer service in certain statutes. The Opinion, however, does not explain why the Legislature did not make separate references to water service and sewer service in Tenn. Code Ann. § 6-51-301 (1998). The Opinion’s discussion of the various statutes that separately refer to potable water service and sewer service demonstrates that the Legislature can and will clearly distinguish between the two when such is the Legislature’s intent.

The Hearing Officer finds that, based on the treatment of the term “utility water service” by the courts to date, and based on the Legislature’s ability to distinguish between potable water

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<sup>132</sup> Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452, \*2 (August 20, 2004). The opinion offers Tenn. Code Ann. §§ 6-51-102 (1998), 6-54-122 (1998), and 7-35-201 (1998) as examples where water service and sewer service are referred to separately. See Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452, \*2 (August 20, 2004).

<sup>133</sup> Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452, \*2 (August 20, 2004).

<sup>134</sup> *Id.*

<sup>135</sup> Tenn. Code Ann. § 6-54-122(f) (1998) states: “This section shall not apply to the exercise of the powers of eminent domain by a municipality insofar as such powers are exercised to acquire interests in property to be used directly or indirectly for the benefit of the operations of a municipal utility including, without limitation, electric utility services, gas utility services, *water utility services*, sewer utility services, storm water management services, telecommunication utility services, and any facility or equipment deemed by the municipal utility to be necessary for the provision of any one (1) or more of the foregoing utility services [emphasis added].”

service and sanitary sewer service when it so chooses, it is reasonable to construe the term “utility water service,” as used in Tenn. Code Ann. § 6-51-301(a) (1998) as including sanitary sewer service. Therefore, the Hearing Officer concludes that a court is likely to find that Tenn. Code Ann. § 6-51-301 (1998) operates to exclude municipalities (and utility districts to the extent that they are deemed “municipalities”)<sup>136</sup> from extending service into areas covered by the CCN of a private company.

Attorney General Opinion No. 04-134 commented further that other statutes, including Tenn. Code Ann. § 7-51-401(a) and (c) (1998) and Tenn. Code Ann. § 7-82-301 (1998), would also be relevant to the issue of whether “utility water service” includes sewer service.<sup>137</sup> The Opinion states that the term “public agency” as used in Tenn. Code Ann. § 7-51-401 (1998) “arguably includes a utility company holding a certificate of authority from the Tennessee Regulatory Authority.”<sup>138</sup> Nevertheless, contrary to the Opinion statement, the Company has argued that § 7-51-401 (1998) *et seq.* applies only to political subdivisions of the state and does not prohibit a municipality “from extending sewer service into the unserved area of a certificated utility when the municipality does not annex such area.”<sup>139</sup> The Hearing Officer finds no error in the Company’s analysis of this statute. Subsection (a) states that the entities referred to therein may lawfully provide service beyond their respective boundaries to “customers desiring such service.”<sup>140</sup> A private company operating under a CCN granted by the Authority is not similarly restricted. Rather, a private company may extend its facilities beyond the boundaries of its

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<sup>136</sup> See Tenn. Code Ann. § 7-82-301 (1998) designating utility districts as “municipalities.”

<sup>137</sup> Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452, \*2 (August 20, 2004). The Hearing Officer notes that Tenn. Code Ann. § 7-82-301 (2004) is a part of the Utility District Law of 1937 and generally describes the legal status of utility districts incorporated under its provisions.

<sup>138</sup> Tenn. Op. Atty. Gen. No. 04-134, 2004 WL 2077452, \*2 (August 20, 2004).

<sup>139</sup> *Company’s Reply*, p. 3 (August 27, 2004).

<sup>140</sup> Tenn. Code Ann. § 7-51-401(a) (1998).

service area to any area contiguous to its system regardless of whether there are customers located in the contiguous area desiring its services.<sup>141</sup>

Subsection (c) of § 7-51-401 (1998) prohibits public agencies from extending services to areas already serviced by other public agencies.<sup>142</sup> There is no such bar applied to private companies operating as public utilities. Rather, private companies may apply to the TRA pursuant to Tenn. Code Ann. § 65-4-201 (2004) to establish or construct a system in or into a municipality or other territory already receiving a like service from another public utility.<sup>143</sup> The Hearing Officer concludes that Tenn. Code Ann. § 7-51-401(c) (1998) operates to prevent public agencies from extending service into areas physically occupied by the facilities of other public agencies and does not bar public agencies from extending service into the service area of public utilities as the term “public utility” is defined in Tenn. Code Ann. § 65-4-101(6) (2004).

The Company points out that the live testimony of its sole witness at the Hearing was not contradicted and therefore should control on the issue of whether a CCN should be granted to the full extent requested.<sup>144</sup> The introduction of evidence into the record should not be confused with a party’s right to contradict a position through argument or otherwise commenting on evidence in the record. Evidence is typically introduced to support a proposition, position or contention. The Hearing Officer concludes that the mere fact that the intervenors did not introduce testimony or other evidence into the record does not diminish their right to comment on evidence in the record. Dockets convened for the purpose of considering a request to expand the service area of a public utility’s CCN may have no intervenors at all. Nevertheless, the

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<sup>141</sup> See Tenn. Code Ann. § 65-4-201(a) (2004).

<sup>142</sup> Tenn. Code Ann. § 7-51-401(c) (1998)

<sup>143</sup> Tenn. Code Ann. § 65-4-201(a) (2004).

<sup>144</sup> The Company states, “None of the intervenors introduced evidence objecting to the grant of the certificates sought by the Company.” *Company’s Brief*, p. 5 (August 13, 2004)

absence of an intervention does not give controlling weight to the proof offered in an unopposed petition.

The Company argued that the public need for a countywide expansion of its CCN is evidenced by the thirteen (13) previously granted extensions of its service area in Sevier County and by eight (8) developments in Sevier County that will require some form of wastewater treatment services, one of which, had already opted for a septic tank system due to “delay in approval of the certificates sought in this case.”<sup>145</sup> The example of a developer opting to use a septic tank system, rather than a Company-operated system, does not, by itself, establish a public need for the Company to expand its service area to cover most of an entire county. At most, this example demonstrates that the developer has the present ability to operate without the Company’s services. This example may also demonstrate that the present and future public convenience and necessity do not require an expansion of the Company’s service area to the entire county.

The Company stated in its briefs that obtaining a countywide CCN for Sevier County would accelerate the approval process for local developers before the local planning commission and avoid the costs associated with applying for separate expansions to its CCN.<sup>146</sup> Regarding avoided costs, the record shows that the costs associated with previously granted extensions have been covered by the Company’s existing rate structure and through contracts with developers.<sup>147</sup> The record establishes that the Company’s systems in Tennessee are primarily decentralized and contains no persuasive evidence that the Company is experiencing a financial burden in seeking expansions to its CCN on a system-by-system basis. The Hearing Officer finds that the existence

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<sup>145</sup> *Company’s Brief*, p 6 (August 13, 2004).

<sup>146</sup> *Id* at 8

<sup>147</sup> Transcript of Proceedings, pp 56-58 (July 13, 2004). See also *Utility District’s Reply*, Exhibit A (August 27, 2004)

of a countywide CCN may not remove the local planning commission's ability to individually consider the impact of the installation of Company systems within the county—but it would hinder the Authority's ability to do so because the countywide CCN would obviate the need for subsequent petitions for individual systems within the county.

The Company stated in its post-hearing brief that a single utility serving customers in a given geographic area is more efficient than several providing service because the costs of maintaining personnel, maintenance and operational services are not duplicated at public expense.<sup>148</sup> The Company also stated that its maintenance personnel could perform regular maintenance more efficiently on several systems in the same area than on systems in different locations.<sup>149</sup> The evidence in the record, however, demonstrates that the Company's operations are not located in a single area and instead are established in different locations throughout Sevier County.<sup>150</sup> The Hearing Officer finds no evidence in the record to suggest that granting a countywide CCN will have any significant effect on rates paid by the Company's customers presently, or in the future. For example, the Company did not introduce evidence suggesting that its current maintenance costs are not being covered by its existing rate structure or that, absent the grant of a countywide CCN, it would be necessary to file for a petition to increase its rates. The record reflects that the Company contracts with and trains sub-contractors to perform maintenance on an as-needed basis and that this practice would likely continue whether or not a countywide CCN is established.<sup>151</sup>

The Hearing Officer finds that the grant of a countywide CCN would result in a bypass of an important regulatory requirement for the Company and at the same time automatically impose

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<sup>148</sup> *Company's Brief*, p. 9 (August 13, 2004).

<sup>149</sup> *Id.*

<sup>150</sup> *Late-Filed Exhibit 1*, p. 2 (July 16, 2004)

<sup>151</sup> Transcript of Proceedings, pp 33-35 (July 13, 2004)

additional statutory and administrative requirements on other public utilities seeking to offer service in Sevier County. Any public utility seeking a certificate to offer service in the Company's proposed service area would arguably be in competition with the Company's system. The effect of granting a countywide CCN would be that all subsequent applicants for certificates in Sevier County would be required to meet the burden of proof set forth in Tenn. Code Ann. § 65-4-201 (2004), as discussed above, and the additional burden of proof required by Tenn. Code Ann. § 65-4-203(a) (2004) which contemplates the presence of an existing system.<sup>152</sup> The Hearing Officer concludes that the reasonable needs of the public are better served where the first public utility to be authorized by the TRA to extend its service area to a particular location has a present and actual intent to provide service to that location, rather than an apparent desire to "lock up" an area or to otherwise remove the area from further regulatory oversight.

In support of a countywide CCN, the Company has offered that it is not always the case that its systems are self-contained and designed primarily to meet the particular needs of individual developments.<sup>153</sup> Nevertheless, Mr. Pickney testified at the Hearing on the merits that the majority of the systems the Company operates in Tennessee are sand-gravel filter treatment systems rather than the other larger-scale systems used to serve multiple developments.<sup>154</sup> The record shows that most of the Company's systems are decentralized.<sup>155</sup>

The Company has stated that the *Petition* is consistent with the City's urban growth plan and that the City will save construction costs should it ever annex portions of the Company's proposed service area in which the Company has constructed facilities.<sup>156</sup> In support of this position the Company points to a statement in the City's Regional Growth Plan that "Pigeon

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<sup>152</sup> Tenn. Code Ann. § 65-4-203(a) (2004).

<sup>153</sup> *Company's Reply*, p. 5 (August 27, 2004).

<sup>154</sup> Transcript of Proceedings, p. 43 (July 13, 2004).

<sup>155</sup> *Id.* at 13.

<sup>156</sup> *Company's Reply*, p. 6 (August 27, 2004).

Forge will not provide public sewer outside of its corporate limits.”<sup>157</sup> The Company did not answer the City’s argument that an urban growth plan is designed to avoid premature or sporadic development which strains other utilities and runs counter to the orderly and efficient construction of roads and other essential utilities.<sup>158</sup> The City argued that a countywide CCN would promote “chaotic and inefficient development in the urban growth area.”<sup>159</sup> On the other hand, the City did not offer any evidence or argument that a project-by-project development within its designated urban growth area would not introduce similar “chaotic and inefficient” development. The Hearing Officer notes that the City has not objected to the Company’s currently identified projects that are located within the City’s urban growth areas.<sup>160</sup> The Hearing Officer also notes that the grant of a countywide CCN would remove the ability of the City to offer objections to future individual Company projects located within its designated urban growth area.

The Company has argued that filing petitions to expand its service area on a project-by-project basis precludes the long term planning and construction of larger, regional facilities thereby preventing the public from receiving the benefit of the lower rates associated with larger systems.<sup>161</sup> Nevertheless, the Company offered no evidence in support of this position. To the contrary, the record shows that the Company has, over the last several years, been able to plan and establish approximately forty-eight (48) decentralized wastewater treatment systems statewide under its current rate structure and on a project-by-project basis.<sup>162</sup>

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<sup>157</sup> *Company’s Reply*, p. 6 (August 27, 2004) citing *Direct Testimony of John Raymond Jagger on Behalf of the City of Pigeon Forge*, Exhibit 1 at 11 (July 2, 2004)

<sup>158</sup> *See City’s Brief*, p. 10, 2004.

<sup>159</sup> *Id*

<sup>160</sup> *Late-Filed Exhibit 1*, p. 2 (July 16, 2004) lists five separate Company projects in the Pigeon Forge planning area

<sup>161</sup> *Company’s Reply*, p. 6 (August 27, 2004)

<sup>162</sup> Transcript of Proceedings, p. 13 (July 13, 2004)

The Company has taken issue with assertions by the City and the Utility District in their post-hearing briefs that a decision in this case should take into consideration the effect a countywide CCN would have on competition in the provision of wastewater treatment services in Sevier County. The Company points out that most sewer service in Tennessee is provided by entities over which the Authority has no jurisdiction.<sup>163</sup> The Hearing Officer finds that introducing or preserving competition in the private market for wastewater treatment services is not required by any statute or Authority rule. The only express reference to “competition” in applicable statutes is found in Tenn. Code Ann. § 65-4-203(a) (2004) which prevents competition with an existing public utility absent the requisite statutory determination.

The holder of a CCN for the provision of wastewater treatment services does not enjoy an exclusive right to provide such services within the certificated area. Nevertheless, the holder of a CCN does enjoy the protection of Tenn. Code Ann. § 65-4-201 (2004) and § 65-4-203 (2004) which exclude other applicants from providing such services to areas served by a holder of a CCN unless the Authority first determines that the present or future public convenience and necessity require or will require granting the applicant’s petition for such a CCN and that the holder’s existing facilities are inadequate to meet the reasonable needs of the public or that the holder of the CCN has refused, neglected, or is unable to make necessary additions and extensions.

The Company has stated that the Authority should not consider the interests of the City or the Utility District because each has independent statutory authority to provide the services each offers and because the Authority has no jurisdiction over either of them. On this point the Company has stated that the grant of the *Petition* will not preclude the City from providing

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<sup>163</sup> *Company’s Reply*, p. 7 (August 27, 2004).

service within the area sought by the Company. The City has countered that if a countywide CCN is granted, then, by operation of law, the City will be prevented from serving customers beyond its borders unless it annexes the territory in which those customers are located. The Hearing Officer finds that the present or future public convenience and necessity properly considered under Tenn. Code Ann. § 65-4-201 (2004) includes the present or future public convenience of persons physically located near the present borders of the City and the Utility District and that the legal consequences of the decision rendered in this Docket as to such persons is among the appropriate factors to consider in reaching a decision in this docket.

The Hearing Officer concludes that the Company has not demonstrated that the present or future public convenience and necessity require or will require a CCN inclusive of most of Sevier County. Although the Company has sought to justify the expansion of its service area to include most of Sevier County, in large part, on its desire to reduce the administrative costs associated with seeking individual expansions of its service area, there is no corresponding proof in the record that the Company's costs are not already covered by currently approved rates or that the Company intends to reduce rates to Sevier County customers accordingly if its service area is expanded as requested.

The Hearing Officer concludes that granting a CCN inclusive of most of Sevier County would have the effect of removing the opportunity for the present and future developers and property owners who will be most directly affected by the installation of facilities in or near their properties to comment on the issue of who should be granted the initial certificate authorizing a public utility to provide wastewater treatment service to their properties. A desirable trait of decentralized wastewater treatment systems is that such systems may be scaled to fit the individual needs of particular developers. Granting a CCN inclusive of most of Sevier County may also have the undesirable effect of requiring persons seeking decentralized wastewater

treatment services to contract with a single operator and unnecessarily remove their ability to make independent decisions about the least costly and best system for their purposes. Further, Tenn. Code Ann. § 65-4-207(a) (2004) specifically provides:

The provisions of this part do not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county.

The Hearing Officer finds further that granting a countywide CCN may have the undesirable effect of precluding the Utility District or the City from extending service to customers who desire such service. Given that the Hearing Officer has already determined that the present and future public convenience does not require the grant of a countywide CCN in this case, the Hearing Officer finds further that there is no need to create a potential legal impediment to the City and the Utility District which may operate to prevent them from providing service to persons they are presently able to legally serve and who may want their service. The Hearing Officer holds that, although the grant of a CCN is not exclusive, it does place additional legal and administrative burdens on private companies who later seek to provide service in the area covered by the CCN.

Addressing the statutory criteria for granting a CCN, the Hearing Officer finds that the Company has demonstrated the requisite managerial, technical and financial ability to operate individual, decentralized systems in Sevier County and has never been denied an expansion of its service area based on these three criteria in previous dockets considering similar petitions. Tenn. Code Ann. § 65-4-201 (2004) *et seq.*, however, also requires that the present and future public convenience and necessity of the Company's operations be taken into account prior to an expansion of its service area. The Hearing Officer finds that the public interest is not served by hindering the Authority's ability to examine the impact of projects planned for different locations in Sevier County.

**IT IS THEREFORE ORDERED THAT:**


1. The *Petition of On-Site Systems, Inc. to Amend its Certificate of Convenience and Necessity* is approved to the extent that it requests expansion of Tennessee Wastewater, Inc.'s service area to include the portions of Sevier County, Tennessee, as shown in the Company's *Late-Filed Exhibit 1* filed in this docket on July 16, 2004. The *Petition of On-Site Systems, Inc. to Amend its Certificate of Convenience and Necessity* is denied as to the remainder of the requested service area.

2. Tennessee Wastewater shall file a tariff sheet detailing the rates to be charged for the systems covered by this Order. Such rates shall be consistent with the rates approved in the previous orders of the Authority approving petitions for expansion of the Company's service area in Sevier County.

3. Any party aggrieved by the Hearing Officer's decision in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Order.

4. Any part aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.

5. In the event this Order is not appealed to the Directors of the Tennessee Regulatory Authority within fifteen (15) days, this Order shall become final and shall be effective from the date of entry. Thereafter, any party aggrieved by the decision of the Hearing Officer may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

  
Randal L. Gilliam  
as Hearing Officer